

# Re-Notioning the Legacy Left from Early Conceptualizations on Tribalism: Negotiating an Understanding of the Dynamics of Indigenous Identity Constructs in Federal and State Courtrooms<sup>1</sup>

Scott Ketchum

M.A. Native American Studies, University of Oklahoma

Anthropology Graduate Student at the University of Oklahoma

## An Unintentional Tension

In federal and state courts, ethnographic research has been used as an instrument for justifying the erasure of American Indian cultural identities. This is not a new trend. The legal theft of American Indian homelands was justified through the application of social science theory as a qualified source of testimony on the Indian as subject. In the Supreme Court case *Tee-Hit-Ton Indians v. United States* 348 U.S. 272 (1955), the court was asked to decide if members of the Tee-Hit-Ton, a subgroup of the Tlingit, had property ownership over the timber on their land, as they sought compensation from the sale of timber (Getches and Wilkinson 1984). In the court proceedings, ethnographic evidence revealed the Tlingit both as having a different concept of property ownership from nomadic tribes, and as a predominately sedentary people. In its verdict, the Supreme Court described them as, sufficiently, fitting the U.S. legal definition of a “tribe” or a group of people who possess the right of occupancy in lands under the permission of the federal government. The Supreme Court ruled against the Tee-Hit-Ton lawsuit partly due to the ethnographic work of Aurel Krause, a German geographer.

The courts decided communally owned land did not allow for a conceptualization of private-property, and that communal lands were subject to the tenets of international law for discovering nations, which gave the discovering nation ownership of any unenclosed and undeveloped land. Even if the discovering nation did not improve the territory, their claim was still considered to supplant any aboriginal claim. This distinction between communally-owned and privately-owned land arose because indigenous and tribal law in the United States was formulated by a *colonial consciousness*. *Colonial Consciousness* functions through an apparatus of power, described best as governmentality, a term Michel Foucault articulated in his lectures on Security, Territory, and Population, where he described the “governmentalization” of the state (Foucault 1994:244). In the name of the state, the *colonial consciousness* put tribal cultures on the periphery with regard to the culture of the state, as legalized other—the uncivilized—and therefore having no legitimate claim for either rights or recognition in the political realm.

Edward W. Said describes American identity as being dichotomized between subsuming and nomadic. In Said’s terms, a subsuming identity is an identity that seeks to colonize nomadic identities under a “unitary identity” (Said 1993:xxv). Through Supreme Court decisions, a singular identity for tribal people was codified as an ideal of the *colonial consciousness*. It was in the juridical order that the nomadic Indian became the symbol of a unitary identity, inscribed on North American tribal cultures, denying cultural notions of private-property among sedentary tribal cultures. Thus, American Indian identity was subsumed under the federal government’s dominion as legal object, an artifact of the pre-legal savagery of humanity, defined in terms of a blood pedigree for measuring social civility.

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Currently, political structures configure social cohesion in any given society, as a mechanism for maintaining civilization or civility in the polis. In the political realm, “the Indian” stands symbolic as the primordial being, a being that is a throwback to human past, before the nation-state elevated citizens’ aspirations for enhanced material conditions in society. The equating of social cohesion with civilization, juxtaposes tribalism against civilization, as tribal identities are reduced to a singular image of opposition in the *colonial consciousness*. This places Native American identity construction under the uncertainty of policy and law, awaiting articulation in each piece of legislation and each verdict. At stake in each Supreme Court decision concerning tribal sovereignty and tribal identities, is the ability for Native people to enter into the political arena, as agents on equal footing with other social structure identities, national identities, and ethnic identities, instead of being marginalized as a symbolic legal other.

The use of social theory in courts is not a new concept. Legal interpretations on what sort of title, or how much sovereignty should be recognized for tribal-nations, is frequently shaped through the discursive history of tribalism, which was begun in early anthropological and archeological research. It is in this legal discourse that the ability to articulate the lines of cultural relativism is inverted, as the researcher becomes a cartographer, constructing the borders of tribal identities. In federal Indian law, indigenous people’s capability of advocating an internal perspective for their identity becomes subject to much external legal scrutiny. Through the legal discussions of anthropological research, tribal identities are reduced to a prop, shaped externally through a discourse that measures human achievement as progression towards the ideal civilization or democratic state. This has a profound impact on the articulation of tribal identities as dynamic. Despite the persistence of a distinguishable cultural expression that binds many indigenous communities, ethno-histories are still considered an objective marker for determining the temporality of an indigenous identity by quantifying the beginning or end of being. This is done by placing a tribe’s existence in the historical timeline of civilization, and fixing the tribe’s point of intersection with civilization as the start point for measuring the number of generations before assimilation is accomplished, in degrees of blood. It is in fixing tribal identities to a distinct timeline that the potential to deny the dynamic expression of indigenous cultures exists, which also can have implications for the future of tribal sovereignty.

It is in the legal discourse over tribal identities and tribal-nations’ inherent right to sovereignty that anthropology loses any claim to being apolitical in nature, as anthropological research has been a primary source of data used to justify the current juridical paradigms surmising tribal sovereignty and tribal identities. This paper is an interrogation of the notion of objectivity in using anthropological research, in both federal and state courts, for historicizing a tribe’s (or tribes’) existence, in cases where a tribe has pursued litigation against the federal government. Regardless of changes in federal Indian policy, aspects of tribal law still function under the principals of assimilation. The question of authenticating a tribal history or a tribal culture is formulated by a power structure that legally defines the borders of tribal identities. This makes anthropologists’ testimony questionable as a contrivance of a political perspective, supporting a hegemonic interpretation of law, which may or may not be intentional, but can have political and legal consequences for tribal sovereignty.

### **Legal Indifference Finds Justification in Law**

The drive for national expansion made law an expedient tool to resolve questions of tribal sovereignty, as a hegemonic legalism stifled any dialogue regarding justice from the Supreme Court. United States Supreme Court decisions have been characterized as being prone to partiality in rulings on tribal sovereignty, because of preconceived notions concerning tribal structures and tribal concepts of order. This was warranted by claims made in the seminal works of early anthropologists and social theorists. Essentially placing Native American nations in a political dilemma, tribal-nations have been

forced to adopt principles of self-governance within a framework that presumed their inferiority. Besides legal justification for extinguishing tribal-nations' titles to land, various social theories and ethnographic research have had significant implications on federal Indian policy. As early justification for the supposed evolutionary inferiority of tribal cultures, anthropology was an implement of policy-makers for continuing the need to civilize Native Americans. Previously, I argued that early academics used rational principles to explain why some nations evolved into civilizations and while others did not; Western models for determining the importance of social and economic development for groups of people, became a tool of oppression in the policy realm. According to this scale, the band and tribe are recognized as one of the lowest organizations of human development, while populations that have evolved to form central governments are considered the highest form of human organization. Consistent with this attitude Samuel Morton, in 1839 wrote *Crania Americana*, which claim to demonstrate that Indigenous people were a separate species from other humans (Bieder 1981:311). Ironically, the Indian Removal period was in full swing, as scholars published these ideas, which others translated into political action. With the endorsement of scholars, it was easy for the public to buy into the idea that the American Indian stood in the way of progress and the hoped-for perfect society. This ideal society was the justification to force a singular identity on Native Americans (Ketchum 2010:3).

It is in rationalist principles that measuring civility was conceived of as a matter of quantifying identity through blood. It is what the objective behind the rationale of quantifying blood represents, which tells a lot about the foundation of tribal law, which was purported to be "civilizing" tribal cultures. This suggests that the goal of tribal law and federal Indian policy was not equity, but rather the civilizing of tribal cultures under a *colonial consciousness*. In opposition to this legal condition, blood-quantum became symbolic as a measurement of cultural survival among many Native American communities. Circe Sturm's *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* put forth a detailed account of the intertwining of race and culture among some Cherokee people. Sturm describes the Cherokee as internalizing "these hegemonic notions so that the very discourse of Cherokee identity takes place almost exclusively in racial terms" (Sturm 2002:141).

Besides the racial environment and issues arising over blood, economic considerations are a major justification for the current litigation against many tribal identities. In my recently defended thesis, I discuss how social theories on evolution and economic theories on capital were formulated juxtaposing civilization against tribal societies, equating tribal identities as the evolutionary other standing in the way of progress. As the courts have become the new battleground for protecting tribal sovereignty, the foundation of legal theory is still an obstacle for Native American nations, as it is steeped in prejudice against tribal systems of order. No one really attempts to dispute tribalism as a formation of order. Instead, John Locke's view of land ownership, a motivating factor for accepting governance, challenged communal ownership of land, as of which kinship structures became the target of European's philosophical assault. Locke and other social philosophers felt it necessary to delegitimize the family as a purveyor of civil knowledge and community values. According to Adam Smith, North American tribalism was the "lowest and rudest state of society" because they lacked the proper "state of things" they were neither "sovereign nor commonwealth" (Smith 1901ed:468)(Ketchum 2011:23). It was through denying notions of private-property ownership in tribal societies that the United States was able to legally justify extinguishing tribal-nations' title to their aboriginal homelands.

Racial purity and the ideologue of the master race were embedded in the foundation of tribal law as a consequence of social and anthropological theory, a legacy that still lingers in the courts despite radical shifts in the discipline. Despite the foundational work of Boas on the ideals of relativism, legal decisions from the United States Supreme Court have relied heavily on the

classification system that places tribalism below civilizations. U. S. Supreme Court Chief Justice John Marshall based several of his cornerstone decisions on this system of classification, forming a legal framework in tribal law that supports a hierarchal distinction in systems of order (Getches and Wilkinson 1984). Again, I clarify, in my thesis, that from the beginning social and political theories were treated as experts' testimony on the social arrangement of tribes. I describe the beginning of this trend in my examination of *Fletcher v. Peck* (1810). Upon examining the first case, *Fletcher V. Peck* (1810) established a clear connection between the Supreme Court's utilization of political philosophies as a justification for legally extinguishing Native America sovereignty. In *Fletcher V. Peck* (1810), the Supreme Court posed the question, "What is the Indian title? (Utulsa.edu online)" As too which they answered, "it is a mere occupancy...not like our tenures; they have no idea of a title" (Utulsa.edu online). As support for delineating the types of title, Adam Smith's *Wealth of Nations* was cited as evidence supporting the legal construction of property rights. As discussed previously, Smith's work demonized Native American tribal structures, as if they had no sense of order, predominantly to elevate Western legalism over tribalism (Ketchum 2011:91-92). Tribal law and federal Indian policy was formulated by the federal government as a process for assimilating tribal people, and the ethnographer was to be one of the objective measuring sticks for the endeavor.

### **Can you quantify being? Just Ask an Expert-Indian Instead of an Indian-Expert**

Currently, ethnography has become a weapon in the arsenal of lawyers, corporations, and politicians. Regardless of maintaining cultural relativism, the narratives constructed in research can shape the material conditions of indigenous peoples. Why are Native Americans required to prove or authenticate their identity? Though, it is a simple question, this seemingly is an issue facing indigenous peoples throughout the world. Still, as a question it points to the inherent prejudice against lower social structural identities in the hierarchy of order, as it would seem bizarre if you asked someone from France to prove their identity. Nevertheless, this may be a question of power and where power resonates from as indigenous identities are yoked by a hegemonic legalism to an anthropological lens that freezes tribal identity constructs to an ideal ethnography. Though the term is used in jest, it is an impossible possible that the legal system manufactures in using documents as archival records for measuring the exactness of being. Though it sounds impossible, legal decisions are rendered all the time because of expert testimony used to determine a measurable end for a cultural. This puts outsiders in the position of controlling the definition of "Indianness." Even worse is the double-bind created by the way the U.S. legally interprets anthropological discourse on Native American identities, and then forces tribal identities into a fixed state of being for maintaining recognition.

It is the threat of losing recognition for many tribal-nations that can serve as a restriction upon their development of policies for self-determination. Tribal-nations' dependency on federal appropriations and extensive structural poverty are directly related to the framing of tribal law as a ward relationship. As a ward, tribal-nations are conditioned to depend upon the federal government for subsistence, recognition, and decision-making. Through the legal apparatuses of governmentality, tribal-nations are indoctrinated into functioning as a dependent of the federal government. As the only sub-population in the United States required to maintain and to demonstrate their difference for legal recognition, tribal-nations are bound by legal explanations of tribal sovereignty and their identity that places them in an essential historical context.

In this paper, the term tribal-nations is meant to draw a distinction between the previous tribal structure, that was dissolved by Congress during the 1950s Termination Era, and the new political structure, recognized through the 1975 Indian Self-Determination and Education Assistance Act. This

act supersedes previous legislation and treaties that reduced tribal sovereignty. Treaties are an apparatus for verifying a tribe's previous history of interaction with the United States. Tribal-nations become the locus of sovereign power granted through recognition, placing the power of determining membership in the hands of the political entity or tribal-nation as opposed to a cultural center. This places cultural authenticity in a secondary role for determining tribal identity as the political realm becomes the primary means for identity recognition for tribal-nations.

As to who determines authenticity, the question is relevant for unrecognized tribal-nations in both Congress and in the courts, as another issue of assimilation and the *colonial consciousness*. The problem with questioning authenticity of culture begins from the onset of phrasing the question, as the answer becomes interpreted in a subjective manner. Still, the question itself is subjective, as it assumes that a singular interpretation of a cultural identity is articulable. This singular cultural identity is constructed and measured by Indian-Experts, non-native researchers on tribal issues, without regard for testimony from any possible Expert-Indians, Native researchers. One reason for a lack of credibility given to the testimony of Expert-Indians is the claim of biasness; however, the paradigms employed in research by many Indian-Experts are covert expressions of the *colonial consciousness*, as many of these testimonies are based upon a prejudice against tribal cultures.

### **What is the Future for Anthropology in the Courts?**

Tribal-nations' inherent rights— recognized in treaties—to territory, fishing and hunting grounds, and resources are being examined in federal and states courts with renewed ferocity, as energy shortages and economic opportunities drive the modern corporate explorers. The use of the phrase “modern corporate explorers” is to articulate the teleology of transnational corporations that operate under the logic of expansion for resources by any means necessary. As a result of a through any means necessary policy, indigenous identities are reduced as mere objects and artifacts of a terrain being consumed by the corporation. Stripped of their agency and subjectivity in the economic calculations of corporations, native communities in the United States, once again, are finding their claim of sovereignty tested in federal courts.

It is undeniable that contact with outsiders and globalization has left a mark upon indigenous peoples throughout the world. Tribal identities, like any ethnic identity, have had to undergo various re-articulations of spatiality as a response to outsider's influences on their core subjectivity. This re-articulation is by no means an erasure of identity but part of the dynamics of becoming. Identity construction is never a completely universal endeavor, especially in the context of a cultural identity. A cultural identity is a dynamic expression of being that functions through a core expression of behavioral norms, rituals, and customs among other things. Fredrik Barth, writing as editor, in the book *Ethnic Groups and Boundaries: The Social Organization of Cultural Differences*, articulates how groups are able to sustain their identity despite outside pressure or influences for assimilation. Even though cultural technologies like language can change, Barth concludes that “the group has a continual organizational existence with boundaries (criteria of membership) that despite modifications have marked off a continuing unit (Barth 2002:38).” Even with changes over time, there is something dynamic about the persistence of Native American tribal identities. Tribal cultures have survived as difference. It is how the courts recognize and respect that difference that matters as an expression of the American identity.

If nations with multi-national groups residing in their borders, which are the former-original inhabitants of that territory, are incapable of regarding difference as a necessity for social cohesion then an equilibrium in the socio-economic conditions of the colonizing nation may only be attainable when the colonized has achieved stability in their socio-economic sphere. In the United States, this may include respecting each tribal-nations' policies of self-determination specifically in the courts and

allowing each community to define the boundaries of their tribal identities. Recently, resource shortages, economic motives, and territorial aspirations have put indigenous and tribal identities under intense legal scrutiny. Anthropological research and archeological records are being dissected again in court rooms as objective truth on questions of the genesis and extinction of a tribe's existence. If this legal discourse is to continue, then it is time U.S. legal interpretations of tribal identities are updated with the current discourse on identity construction, and an understanding in the courts that an expert witness for the apparatus of governmentality is not a position of objectivity or relativity for any ethnographer. Instead, it can be a position of power.

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